UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

DOMSEY TRADING COPRORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A SINGLE EMPLOYER **Respondents**		
	Case Nos.	**29-CA-14548**
		29-CA-14619
ARTHUR SALM and FORTUNA EDERY,		**29-CA-14681**
individually and as Executrix of the		**29-CA-14735**
Estate of Albert Edery, deceased [1]		**29-CA-14845**
Additional Respondents		**29-CA-14853**
		29-CA-14896
and		**29-CA-14983**
		29-CA-15012
INTERNATIONAL LADIES' GARMENT		**29-CA-15119**
WORKERS' UNION, AFL-CIO		**29-CA-15124**
		29-CA-15137
LOCAL 99, INTERNATINOAL LADIES'		**29-CA-15147**
GARMENT WORKERS' UNION, AFL-CIO		**29-CA-15323**
		29-CA-15324
		29-CA-15325
		29-CA-15332
		29-CA-15393
		29-CA-15413
		29-CA-15447
		29-CA-15685

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Counsel for the General Counsel
Philip Pierce, Esq. **and** ***Errol F. Margolin, Esq.***
for Arthur Salm
John P. Gibbons Jr., Esq. **and** ***Peter S. Trentacoste, Esq.***
for Fortuna Edery and the Estate of Albert Edery
Scott Markowitz, Esq. **for David Salm** [2]

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[1] The Caption is modified to reflect the amendments made at the trial. See General Counsel Exhibit 2.

[2] I permitted Mr. Markowitz to intervene over the objection of the General Counsel. In this regard, the parties agree that David and Peter Salm entered into a settlement of this case whereby they paid a certain sum of money in escrow to satisfy some portion of the back pay claim. As a consequence, the General Counsel moved to amend the Notice of Hearing so as to remove their names from the Caption and from all of the allegations. However, the parties also agree that the distribution of any monies from the escrow account can only be made if it is ultimately concluded that Arthur Salm is personally liable. Thus, their obligation to make the payments was conditioned on the outcome of this case and therefore

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THIRD SUPPLEMENTAL DECISION

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on November 10, 2010. The issue here is whether Arthur Salm and Albert Edery, as the principle shareholders of the Respondent corporations, but who were not named as Respondents in the original complaint nor in any of the supplemental proceedings, can be held to be personally liable for the backpay amounts owed to the discriminatees. [3]

In her Brief, the General Counsel makes the following contentions, one of which was expressed at the hearing and one which was not:

1. That the corporate veil of the Respondent should be pierced under the rationale of *White Oak Coal Co.,* 318 NLRB 732, 735 (1995), enfd., 81 F.3d 150 (4th Cir. 1996) and therefore the corporate shareholders, Arthur Salm and Albert Edery, should be held personally liable.

2. That when the real property of the Respondent was sold, the recipients of that money, (Arthur Salm and Albert Edery), held it as constructive trustees for the benefit of the National Labor Relations Board as a creditor and therefore those recipients should be held to be derivatively liable for satisfying the debt to the Board.

I note here that the theories about constructive trusts were not plead in the Notice of Hearing and were not articulated at the hearing. The Respondents were therefore not put on notice that these contentions were being made. Further, I am not aware of any Board case law which has ever utilized such a theory to conclude that individuals who were not named in the underlying Complaint could be held personally liable for the debts of a corporation. Nor am I aware of any Board precedent that would rely on state law to find that individuals could be held personally liable for the obligations of a corporation.

Based on the record as a whole including my observation of the witnesses and after considering the Briefs filed I hereby make the following

Findings and Conclusions [4]

The history of this case started in 1989 when the Union commenced an organizing drive among the employees of Domsey Trading. In 1990 about 200 employees went out on strike and when they made an unconditional offer to return to work on August 10, 1990, the Company

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the findings and conclusions herein will have a substantially monetary impact on these two individuals. Therefore, in accordance with Section 102.29 I permitted Markowitz to intervene on their behalf. See *Camay Drilling Co*., 239 NLRB 997, 998 (1978).

[3] The Notice of Hearing also claimed that Fortuna Edery, the widow of Albert Edery, should be held to be personally liable as the executrix of his estate or alternatively as the recipient of the money that Albert Edery derived from the sale of the Respondent's real property. After the close of the hearing the General Counsel and counsel for Fortuna Edery entered into an agreement whereby she would pay his portion of the backpay liability in the event that it was concluded that he was personally liable. As such, the General Counsel asked me to sever that portion of the case involving Fortuna Edery and remand those matters to the Regional Director. I did so by Order dated February 1, 1011. In this regard, the General Counsel, in response to my inquiry, stated: "Thus in your decision, there would be no need for you to make findings of facts or conclusions of law concerning Fortuna Edery."

[4] I note that there are no credibility issues and no disputed issues of fact.

failed to reinstate them. Since then there have been numerous legal proceedings which will be summarized below.

As found by Administrative Judge Ben Schlesinger in an opinion issued on November 1, 1991, Domsey Trading Corporation and Domsey Fiber Corporation were New York corporations located in Brooklyn, New York where they were engaged in the grading, packing, and shipping of used clothing for export. The Judge also found that a third corporation called Domsey International Sales Corporation was located at the same address where it sold used clothing and textiles and related goods in a retail facility located next to the plant of the Trading and Fiber Corporations. He concluded that the three corporations were affiliated business enterprises with common officers, ownership, directors, management, and supervision and constituted a single integrated business enterprise and a single employer within the meaning of the Act. The Respondent's premises were located at 431 Kent Avenue, Brooklyn, New York.

There is no dispute that the principle owners of the corporations were Arthur Salm and Albert Edery. [5] The Judge also concluded that the day-to-day operation of the plant was entrusted to Arthur Salm's three sons, Peter, Clifford and David. There is no evidence to contradict the testimony of Fortuna Edery that she had nothing to do with the operations of the business.

On March 23, 1993**,** the Board issued a Decision at 310 NLRB 777**,** finding *inter alia*, that after the Union made an unconditional offer to return unfair labor practice strikers to work on August 10, 1990, the Respondent did not make a valid reinstatement offer until Aug. 20, 1991. (A little more than one year later). Therefore, the Board ordered the Respondent to reinstate approximately 200 employees and make them whole for any loss of earnings caused by the illegal refusal to reinstate the strikers. [6] The backpay for these individuals has been litigated in subsequent proceedings and what is at issue in this proceeding is who should be responsible for paying the money. As the General Counsel believes that there is zero or insufficient funds available from the corporate entities comprising the Respondent, she is making a claim for money from individuals who were not named as Respondents either in the original unfair labor practice case or in the subsequent backpay proceedings.

On February 18, 1994, the United States Court of Appeals for the Second Circuit entered a judgment which enforced, in full, the first Board Order issued against Domsey, their officers, agents, successors, and assigns.

On October 27, 1997, a backpay hearing opened and this was presided over by Judge Michael Marcionese. During the course of the hearing the Judge refused to require the Board's Regional Office to reimburse the Respondent for the costs of an interpreter. The Respondent filed an interim appeal which resulted in a decision on March 28, 1998 by the Board at 325 NLRB 429 which sustained the Judge's ruling.

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[5] According to the tax returns put in evidence as General Counsel Exhibits 4 and 5, Arthur Salm held 48% of the shares and Albert Edery held 50% of the shares. Peter and Clifford Salm each held 1% of the shares.

[6] The Board also found numerous other unfair labor practices committed by the Respondent and in light of the egregious nature of those violations ordered the notice to be read to the employees by Peter Salm, the Respondent's manager.

On October 14, 1999**,** Judge Marcionese issued his Supplemental Decision and Recommended Order in which he held that the Respondent owed the employees backpay in the amount of $1,070,066.67 plus interest.[7] (This number was later reduced somewhat).

As far as I know, the Respondent was still engaged in business operations at the time that it received this Decision.

On January 9**,** 2002, Domsey Trading sold the property located at 431 Kent Avenue, Brooklyn, New York. This was almost three years after the ALJ had issued his decision recommending that the Respondent reimburse employees in the amount of $1,070,066.67 plus interest. There was no evidence presented by any party as to the reason or reasons why the property was sold. But absent any other evidence of motivation and given the amount of time between the ALJ's decision in October 1999 and the sale of the property in January 2002, it cannot be said with any certainty that the motivation for the sale was to evade the debts incurred to the discriminated employees. (At the time of the sale, the ALJ's decision was on appeal to the Board). There may be any number of other plausible and legitimate reasons that the owners of Domsey decided to sell the property and terminate their business.

In any event, in early January 2002, a parcel of property with two buildings located at 431 Kent Street and jointly owned by Domsey Trading Corp. and another entity called Edery-Salm Associates was sold to a buyer. The closing statement which is General Counsel Exhibit 3 shows that a check in the amount of $9,062,082.26 was issued to Domsey Trading and a check in the amount of $2,281,750.81 was issued to Edery-Salm Associates. In addition, the closing statements along with the testimony of Benjamin Weinstock, the attorney for the buyer, indicates that a payment of approximately $2.6 million was made to a law firm for the benefit of Domsey Fiber Corporation.

General Counsel Exhibit 6 shows that as of December 31, 2001, Domsey Trading Corporation had a balance of $848.66 in the North Fork Bank. [8] This bank statement also shows that from December 31, 2001 through January 22, 2002 a series of deposits and payments were made in this account. The largest deposit was in the amount of $9,102,429 representing the proceeds from the sale. The two largest payments were in the amounts of $3,262,966.21 representing a payment to Arthur Salm and $4,555,379.85 representing a payment to Albert Edery. After accounting for all deposits and payments, the ending balance in this account as of January 22, 2002 was back to $848.66, exactly where the account stood on December 31, 2001. Thereafter by May 31, 2002 Domsey Trading's balance at North Fork Bank was $5.66. As of June 30, 2002, its balance was negative $4.34.

In connection with this sale, Mr. Weinstock testified that in addition to a conveyance of title, the purchaser received at the closing, a good standing certificate, which is a document from the New York Department of State confirming that the corporations owning the property

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[7] In his Decision and the Board's later rulings on this decision, the amount of interest actually accrued was never calculated. It appears that internally the Regional Office calculated the interest at over $1,000,000 but those calculations were not shared with the Respondent. Nevertheless, given the size of the net backpay calculated by the ALJ and the number of years that had gone by since the original violations had occurred, the Respondent should reasonably be on notice that the amount of interest would be substantial.

[8] This bank was subsequently merged into Capital One Bank and the exhibits produced by the General Counsel were authenticated as business records by Wanda Torres, an employee of Capital One Bank.

were still validly in existence and had not either been voluntarily or involuntarily dissolved. Weinstock also testified that he received a resolution from the shareholders indicating approval for the sale.

Although I do not know exactly when the Respondent ceased operating its business, I shall conclude that no business operations at this location were conducted by the Respondent after the sale of the property. [9] There was no evidence as to how the purchaser used this space. I would surmise based on the bank statements of Domsey Trading that its business operations at the Kent Avenue site were probably terminated some time before the end of 2001.

The record shows that after the sale and receipt of money, checks were issued to Arthur Salm and Albert Edery as follows:

A check signed by Arthur Salm drawn on the account of Domsey Trading at North Fork Bank, dated January 10, 2002 was made out to Arthur Salm in the amount of $3,262,966. This was deposited into his personal account at the same bank.

A check signed by Arthur Salm drawn on the account of Edery-Salm Associates at North Fork Bank, dated January 10, 2002 was made out to Arthur Salm in the amount of $1,096,785. This also was deposited into his personal account.

A check signed by Arthur Salm drawn on the account of Domsey Trading at North Fork Bank dated January 14, 2002 was made out to Albert Edery in the amount of $4,555,379.85. This was deposited by Edery into a joint account with his wife Fortuna Edery into an account at Meryl Lynch.

After receiving and endorsing checks from Domsey Trading and Edery-Salm Associates, Arthur Salm and Albert Edery went on to make further transfers as follows:

On January 14, 2002, Arthur Salm made out a check in the amount of $4,000,000, which he deposited into his brokerage account at Meryl Lynch.

On or about March 5, 2005, Arthur Salm transferred money and stocks held in one of his Meryl Lynch accounts to another Meryl Lynch Account.

On or about December 5, 2002, Arthur Salm transferred the assets in his Meryl Lynch account to another Meryl Lynch account in the name of his wife, Carla Salm.

On or about June 12, 2003, the assets previously transferred to his wife were transferred back to an account in the name of Arthur Salm.

As noted above, the check received by Albert Edery was deposited into a joint account with his wife at Meryl Lynch. When he died on February 15, 2006, the money and assets in the account automatically passed to his wife and she became the sole surviving owner of the account. [10]

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[9] In his Answer to the Notice of Hearing, Counsel for Arthur Salm admitted that Domsey Trading, Domsey Fiber and Domsey International ceased operating on January 31, 2002.

[10] The estate of Albert Edery was probated in New York and Fortuna Edery was the estates' executrix. Letters Testamentary were issued by the Surrogate's Court in 2006 and she was thereby authorized by the Court to dispose of and distribute any other property owned by Albert Edery in

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Needless to say, neither Domsey Trading, Edery-Salm Associates, the other affiliated corporate entities, Arthur Salm nor Albert Edery, (or his wife upon his death), made any arrangements to reserve money for or pay off the backpay amounts that likely were owing to the discriminated against employees. Nor was any notice given to the Board.

While all of this was going on the Board's backpay case was proceeding in its own interesting way.

On September 30, 2007, the Board at 351 NLRB 824, issued a decision in the backpay case that had been heard back in 1997 and in which the Judge issued a decision and recommended order on October 14, 1999. The Board sustained the Judge's findings in part and reversed in part. Among other things, the Board held that strike benefits paid to the employees in the particular circumstances of the case should be construed as interim earnings. Additionally, in the hiatus between the ALJ's decision and the Board's decision, the Supreme Court decided that undocumented aliens may be denied backpay in certain circumstances. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), As a consequence, the Board remanded the case to the Region to recalculate the amount of backpay for about 160 individuals and remanded to the Judge the question of backpay for six discriminates under *Hoffman*.

On Sept. 25, 2008, a two member Board issued a Second Supplemental Decision in the backpay case. The Board ordered the Respondent to pay the recalculated backpay awards set out by the Region. The decision also ordered that the backpay claims of two discriminatees remanded to the judge be withdrawn and that the Respondent pay certain other discriminatees the amounts set out in his second supplemental decision. Finally, the Board adopted the judge's recommendation to place in escrow the backpay award for one discriminatee whom the General Counsel could not locate.

On August 16, 2010, and after the Supreme Court had concluded that the Board could not issue decisions without at least a three member quorum, the Board issued another decision in the backpay case. Without going into all the details, the Board basically affirmed the second supplemental opinion of the Administrative Law Judge. However, the total backpay liability was modified and set at $914,784.37 plus interest.

At some point after August 16, 2010, the Board filed with the United States Circuit Court, (Second Circuit), a petition to enforce the Board's backpay decision. That matter is currently pending before the Circuit Court. In addition, the Board has sought and obtained from the Court some kind of order freezing the personal assets of Arthur Salm.

And so this case came to me.

Analysis

Let me state at the outset that my entire sympathy lies with the employees who suffered losses as a result of the Respondent's unlawful conduct against them. These people and their families have not been paid after almost 20 years of litigation notwithstanding the fact they were

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accordance with the terms of a will. It is unknown by me as to whether there was any other property, money or assets that were owned by Albert Edery at the time of his death..

the victims of unlawful conduct. The owners of the Respondent companies committed unfair labor practices and but for the creation of a fictional person called a corporation, would be liable to recompense the victims of their unlawful actions and/or the unlawful actions of their agents.

Paying these workers is the morally correct thing to do. The issue here is whether that moral obligation is coextensive with a legal obligation.

The invention of the limited liability corporation, with the concept that the enterprise had a separate legal identity from its owners concomitantly gave rise to the concept that the owners did not incur personal liability for the actions or debts of the enterprise. This idea arose at a time of economic and industrial expansion in the United States and the public policy was to encourage people to invest their money and take risks. That is, the losses that might be incurred by tort victims or by vendors and lenders to a corporation were deemed to be outweighed by the benefits that would be derived by society at large by limiting risk and encouraging development. As pointed out in *NLRB v. Greater Kansas City Roofing*, 2 F. 3d 1047, 1051 (10th Cir. 1993);

> The corporate structure is an artificial construct of the law, a substantial purpose of which is to create an incentive for investment by limiting exposure to personal liability. "The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 402-03, (1960). [11] In extreme circumstances, however, the corporate form will be disregarded and the personal assets of a controlling shareholder or shareholders may be attached in order to satisfy the debts and liabilities of the corporation. However, the corporate veil should be pierced only reluctantly and cautiously. *Cascade Energy and Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir.), cert. denied, 498 U.S. 849. Piercing the corporate veil is an equitable action and as such is reserved for situations where some impropriety or injustice is evident.

For a very long time, the Board's case law dealing with the question of individual or personal liability of corporate shareholders was enunciated in *Riley Aeronautics Corp*., 178 NLRB 494 (1969). In that case the Board stated:

> [T]he corporate veil will be pierced whenever it is employed to perpetrate a fraud, evade existing obligations, or circumvent a statute…. Thus, in the field of labor relations, the courts and Board have looked beyond organizational form where an individual or corporate employer was no more than an alter ego or a "disguised continuance of the old employer"…; or was in active concert or participation n a scheme or plan of evasion…; or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as

[11] Interestingly enough, *NLRB v. Deena Artware, Inc*., does not have that much to say about the corporate veil doctrine and its holding was quite limited. Essentially, the NLRB had petitioned the Court for a contempt order which had enforced the Board original holding that the Respondent had violated the Act and owed certain employees backpay. It also asked the Court to approve discovery on the grounds that it believed that the Respondent Deena Artware had transferred its assets to a new corporation and that the common owner was engaged in a shell game to evade the backpay liability that had not yet been ascertained by the Board in a supplemental backpay proceeding. In essence the Supreme Court held that the contempt proceeding was warranted and remanded the case so that the Board could conduct discovery.

backpay…; or so integrated or intermingled his assets and affairs that "no distinct corporate lines are maintained."

In *White Oak Coal Co.,* 318 NLRB 732, (1995), a unanimous five member Board reconsidered the *Riley* standard because they felt that its "multifaceted approach to imposing personal liability to be unclear and unwieldy." Instead the Board adopted the 10Th Circuit's two pronged approach enunciated in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993). The Board further stated that it was reaffirming "that personal liability for remedial obligations arising from corporate unfair labor practices under the National Labor Relations Act is a question of federal law because it arises in the context of a Federal labor dispute." Citing *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331, 335 (6th Cir. 1990) and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). As to the new standard the Board stated as follows:

> Under Federal Common law, the corporate veil may be pierced when: (1) there is such unity of interest and lack of respect given to the separate identify of the corporation by its shareholders that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.
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> When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of [same] or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintained arm's length relationship among related entities; (8) diversion of the corporate funds or assets to non-corporate purposes; and in addition, (9) transfer or disposal of corporate assets without fair consideration.
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> When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.

To state the obvious, this category of cases would not be litigated if the corporate entity or entities that had incurred liabilities could pay the debts. It is only when the coffers are empty that one begins to look elsewhere for payment. And what better place to look than to the principle shareholders of the corporation where the corporate pockets are empty either because of normal and adverse business conditions *or* by the transfer of assets to favored persons. (Usually the shareholders or their relatives).

The *White Oak* test is a two pronged test. It is simply not enough that only the second prong has been met; that it would be unjust not to have access to the shareholder's assets. The whole point of a corporation is to shield its shareholders from the corporation's creditors.

Therefore, by definition, the doctrine of limited liability is inherently unfair insofar as the corporation's creditors are concerned. Inequity is the name of the game, provided of course that the shareholders observe the prescribed corporate forms. Under current Board law, except for the limited circumstances described in *White Oak* and subsequent cases, to say that it would be unjust to allow the shareholders to escape liability, is simply to state a circumstance which is insufficient by itself to hold them personally liable.

Since the Decision in *White Oak*, the Board has issued a number of decisions dealing with this issue, the most recent of which was *Rome Electrical Systems Inc. et al*, 356 NLRB No. 38 (November 24, 2010). Other fairly recent cases relied on by the General Counsel and the Respondents include *A.J. Mechanical*, 352 NLRB 874 (2008), enfd., 186 LRRM 2224 (11th Cir. 2009); *D.L. Baker Inc. t/a Baker Electric*, 351 NLRB 515 (2007); *Flat Dog Productions Inc*., 347 NLRB 1180 (2006); and *SRC Painting, LLC*, 346 NLRB 7070 (2006). All of these cases, and others not cited by the parties, involve backpay proceedings with complex factual patterns.

It seems to me that the outcomes in these cases were highly fact specific given the large number of factors that need to be analyzed under the *White Oak* standard. And although it is seems to me that with respect to the first prong that not all of the eight factors need to be proven, in none of the cases was personal liability found where only one factor was proven. Even if that factor, (the most important in my opinion), was evidence that personal and corporate assets had been commingled.

Moreover, in weighing the various factors, the majority opinion in *Flat Dog Productions Inc*., 347 NLRB 1180 (2006), stated that "the party asserting that the corporate veil should be pierced, in this case the General Counsel, has the burden of proof, and that burden is a heavy one. See *Contractors, Laborers, Teamsters & Enitg. v. Hroch*, 757 F.2d 184, 190-191 (8th Cir. 1985)."

In the present case the General Counsel has produced evidence as to only a single element; namely the "commingling" factor listed by the Board in *White Oak*. She produced no evidence to contradict the testimony of the Respondent's CPA that the corporate entities were adequately funded; that there was no commingling of funds between the shareholders and the corporations, (other than the final distribution of assets); that they maintained adequate and separate corporate books and records; and that the corporations and the shareholders filed separate tax returns.

As noted above, in *White Oak* the Board stated that "when assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, *and* (b) the degree to which individual and corporate funds, other assets and affairs have been commingled.

And even as to the alleged commingling, I am not so sure that what transpired in January 2002 fits easily within the definition of commingling as that term has been used in these types of cases. As I read the cases, the transactions that the Board has described as "commingling" have typically involved multiple transactions over a period of time whereby the shareholders typically took money out of the corporation for their own personal use. (On occasion, shareholders may transfer their own money into the corporation). These types of transactions, other than normal salaries or authorized dividends, generally have occurred over an extended period of time during which the corporation was still engaged in its normal business activities.

In my opinion, the facts in the present case are somewhat distinguishable and are more like the situation that would occur when a corporation ceases its business operations and its assets are then liquidated and distributed to its shareholders. It is difficult to commingle assets with a *de facto* defunct corporation, even one which has not yet been officially dissolved. In this case, the building and property at Kent Avenue was sold in an arm's length transaction to a third party for around $12 million. And after the larger portion of that money was deposited in the accounts of Domsey Trading Corporation and Edery Salm Associates, those same amounts were transferred to the two principal owners of the Respondent, namely Arthur Salm and Albert Edery who then transferred the monies to their own personal accounts. (I have no idea what happened to the money that was paid by the purchaser to Domsey Fiber Corporation). In my opinion this one time liquidation and distribution of corporate assets, may not be the type of transactions that the Board has previously found to constitute commingling. [12]

In her Brief, the General Counsel offers an alternative theory as to the claim that Arthur Salm and Albert Edery should be held to be personally liable. As stated by the General Counsel, although "this case falls within the purview of Board law, it is also a corporate dissolution case and, as such, New York State Business Corporation Law (BCL) and supporting cases are applicable." She asserts that under New York law, the shareholders of a corporation, after a dissolution, are construed to "hold the assets they received in trust for the benefit of creditors" and are therefore "jointly and severally liable to existing creditors of the corporation." Citing *Rodgers v. Logan*, 121 A.D. 2d 250, 253; *Long Island Light Co. v. Chestnut Sta., Inc.*, 2010 N.Y. Misc. Lexis 3476 and *Wells v. Ronning*, 269 A.D. 2d 690, 692, 702 N.Y.S. 2d 718.

I have a couple of problems with this alternative theory of personal liability.

1. The original Notice of Hearing made no mention of this theory and the General Counsel asserted at the hearing that the only theory upon which she was asserting personal liability against the corporate shareholders was the *White Oak Coal* theory. This alternative theory was only raised for the first time when the General Counsel filed her brief and the Respondents were not put on notice that this was being asserted. In my opinion, this theory cannot be legitimately asserted at this time. See *New York Post*, 353 NLRB 343, 344 (2008).

2. As noted above, the law regarding "piercing the corporate veil" insofar as NLRB cases are concerned, has been defined by the Board and reviewing United States Circuit Courts as being a question of federal law. That means that the laws of the individual states are, in effect, preempted because of a policy of administering a uniform body of law that governs labor relations for those employers, their employees and labor organizations that fall within the Board's jurisdiction. Thus, to the extent that New York statutes or case law may have a different standard for holding a corporation's shareholders personally liable, that standard is not, in my opinion, applicable to cases litigated as unfair labor practices under the National Labor Relations Act. As I am aware of no precedent giving me the authority to apply New York law to this issue, my role as an Administrative Law Judge does not really permit me to establish new precedent on behalf of the Board.

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[12] It may be that the Board might decide to modify the *White Oak* standards so that the single factor of commingling would be sufficient to establish personal liability. Or it might decide, subject to Court review, that when there has been a liquidation and substantially complete transfer of corporate assets to shareholders without notice to creditors, that this type of transaction amounts to a "fraudulent conveyance" and therefore would be an independent ground for piercing the corporate veil. But as I understand the cases decided by the Board this is not the current view of the law and I am bound by existing precedent.

Accordingly, for the foregoing reasons and based on the current state of Board law, I am constrained to find that the General Counsel has not shown that the corporate veil should be pierced in order to hold the shareholders personally liable. [13]

Dated Washington D.C. , February 14, 2011.

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Raymond P. Green
Administrative Law Judge

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.